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RECORD, CASE No. 13,358.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM ~~No. 261.~~ ~~24~~ 12

WILLIAM W. HICKIES AND THE ITHACA CONSOLIDATED GOLD AND SILVER MILL AND MINING COMPANY, APPELLANTS,

vs.

CHARLES E. PHILES, THOMAS H. BLAIR, AND HENRY D. POLHEMUS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED OCTOBER 17, 1888.

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No. 225.

In the Supreme Court of the Territory of Arizona.

CHARLES E. PHILES, THOMAS H. BLAIR, and HENRY D. POLHEMUS, Plaintiffs & Respondents,
vs.
WILLIAM W. HICKIES and THE ITHACA CONSOLIDATED GOLD AND SILVER MILL & MINING Co., Defendants & Appellants.

Transcript on Appeal.

From the district court, second judicial district, county of Maricopa.

A. D. Lemon, Street & Goodrich, att'ys for defendant-

Filed ——, 188-.

—— ——, *Clerk.*

1 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

CHARLES E. PHILES, THOMAS H. BLAIR, and HENRY D. POLHEMUS, Plaintiffs,
vs.
WILLIAM W. HICKIES and THE ITHACA Consolidated Gold and Silver Mill and Mining Company, Defendants.
} Amended Complaint.

I.

The plaintiff-, by leave of the court, etc., file this their amended complaint, and allege that on the 18th day of January, A. D. 1881, they owned and were in possession of as tenant in common the "Boss" mine, each owning an undivided third part thereof; that Charles E. Philes and Thomas H. Blair owned and were in possession of as tenants in common the "Bonito" mine, each owning an undivided half part thereof, and said Charles E. Philes owned and was in possession of in his own right the "Pinto," "Mexican," "Monarch," and "Spring" mines; also a certain mill site belonging to the said mines, being six mines in the aggregate, all located in the Cave Creek district, in Maricopa county and Territory of Arizona, and lying near each other, and which were then and are now of great value. The respective dates of the locations of said
2 mining claims, the time when and place where recorded, etc., all fully appear in a certain deed hereinafter mentioned as Exhibit "A," to which reference is here made for that purpose.

II.

That on the 18th day of January, 1881, William W. Hickies, one of the defendants in this action, then a resident of the State of New York and now a resident of California, representing himself as a

man of considerable financial means and extensive business associations, induced the plaintiffs to convey to him all their rights and interests in said mines, together with said mill site, for the purpose of enabling him to organize a joint-stock company, embracing all said mines, for the purpose of developing and working the same under the name of the "Ithaca Consolidated Gold and Silver Mill and Mining Company," and to this end the plaintiffs, on the said 18th day of January, A. D. 1881, all joined in one and the same quit-claim deed, and acknowledged and delivered the same on that day, conveying said mines to the said Hickies, which deed is dated 15th January, 1881, and on the same day and for the same purpose said Philes conveyed by deed to said Hickies the said mill site, and on the same day and as part of the same transaction said Hickies and these plaintiffs executed an agreement in writing explanatory of the purpose and object of said deeds. Copies of said deeds and written agreement are hereto attached, marked A, B, and C respectively, and made part of this complaint, the originals of which were all duly recorded by the recorder of said county of Maricopa on the 18th day of January, A. D. 1881.

III.

The said deeds and agreement, represented in this complaint as Exhibits A, B, and C, were all acknowledged and delivered contemporaneously as parts of the same transaction, and all constitute but one contract as to the subject-matter thereof, and, according to the true intent and meaning of said deeds and written agreement, said Hickies was invested with the title to said mines and mill site
3 formerly owned by the plaintiff, but as trustee for them and for the sole purpose of organizing and incorporating a joint-stock company as aforesaid, and when so organized twenty thousand shares for each of the six mines so consolidated (or 120,000 in all) of the capital stock were to be set apart as a special fund for defraying the expenses, etc., of said company, so as to leave the other stock free from assessments for such purposes; that after the number of shares so assigned, disposed of, and set apart were deducted from the entire capital stock, then three-fifths of the remainder were to be issued and delivered to these plaintiffs as paid-up stock and then credited on the stock books with the same. It was then intended to be expressed in said agreement—was then and yet is the agreement between the plaintiffs—that said three-fifths of said stock shall be divided between them and issued to each of them in proportion to the interest which each party had owned and conveyed in the said consolidated six mines and should each have credit on the stock books accordingly, and, for the purpose of apportioning this stock, it was understood by the plaintiffs that each of said mines before consolidation were of equal value.

IV.

Plaintiffs aver that the real consideration for the execution of said deeds conveying said mines to William W. Hickies was his undertaking and agreement to organize said company and issue and de-

liver to them said three-fifths of said stock as aforesaid, said mines to form the capital of said company.

V.

On the 20th day of July, A. D. 1881, said Hickies procured the organization of said company in the State of California and under and by virtue of the laws of that State the articles of said incorporation were filed and recorded in the county of Maricopa and Territory of Arizona on the 12th day of August, A. D. 1882. A copy of said articles is hereto attached, marked Exhibit "D," and made a part of this complaint.

VI.

4 By the articles of incorporation of said company the capital stock is fixed at $6,000,000, divided into 600,000 shares of the par value of ten dollars each, said Hickies subscribing for and took 584,600 shares of said stock, as appears from the said articles of incorporation. The said mining property so conveyed by these plaintiffs was the only capital and formed the basis of the capital stock of said company at the time and ever since its organization.

VII.

On the 13th September, 1882, said Hickies, for the express consideration of ten dollars (but, in fact, to vest the company with the legal title to the same, being its capital and only means), conveyed said mines and mill site to the "Ithaca Consolidated Gold and Silver Mill and Mining Company," one of the defendants in this action, of which company he was their president, and said company then took possession of said mines and have hitherto continued in possession thereof, and has, during said time, extracted, taken, and removed from some of said mines large quantities of ores and minerals of the value of eighty thousand dollars, and converted the same to his own use, to the damage of the plaintiffs twenty-five thousand dollars.

VIII.

The defendants nor either of them have delivered to the plaintiffs or any of them any part or shares of stock of said company, as by said agreement they were entitled to receive, but said defendants and each of them positively refuse so to do after being thereunto requested. They also refused to give plaintiffs or any of them credit on the stock book of the company for any shares of said stock, nor has said corporation defendants rendered any account to the plaintiffs with respect to the gain and profit of said mines when in its possession as aforesaid, but refuse so to do after being thereunto requested.

IX.

Plaintiffs further allege that the retaining 584,600 shares of said

stock by said Hickies in his own name and refused to issue and deliver any part of said stock to the plaintiffs is contrary to right and justice and a gross fraud upon them and their past rights in the premises.

5

X.

Plaintiffs further allege that after setting apart 120,000 shares of the capital stock of said company to defray expenses, etc., three-fifths of the residue (288,000 shares) should have been delivered to the plaintiffs, to wit, 232,000 to Charles E. Philes, 40,000 to Thomas H. Blair, and 16,000 to Henry D. Polhemus, according to their respective interest in the entire mining property.

XI.

Plaintiffs own that said corporation took the conveyance of said mines from Hickies with full notice of plaintiffs' rights, and now holds the same, charged with and subject to the trust imposed on said Hickies by his said agreement.

XII.

Said corporation from its organization never had an agent or officer residing in this Territory on whom process could be served until the 27th day of November, 1883, when it appointed N. A. Morford, of said county of Maricopa, its legal agent, whose certificate of appointment was not filed for record in said county until December 19th, 1883.

XIII.

Plaintiffs aver defendants should deliver to them their said shares of said stock and give them the proper credits therefor on the proper books of said company, according to the true intent of their said agreement, or said deeds made by them to Hickies should be declared null and void and plaintiffs be restored to all their former rights in said mining property.

Wherefore plaintiffs demand judgment against the defendants that they deliver in due and legal form, within a short day to be fixed by the court, the number of shares of the capital stock of said company to which they are justly entitled, and that defendants give them credit for the same on the stock books of said company as paid-up non-assessable stock; and on failure to do so, then said deeds from plaintiffs to said Hickies and the deed from Hickies to the corporation defendants, so far as plaintiffs' rights are concerned,

6 be declared absolutely void and of none effect, and that all the right, title, and interest which the plaintiffs and each of them had or hold in said mines or any of them and said mill site prior to the execution of said deed be severed and restored to them, and that defendants and all persons claiming through or under them or either of them be estopped from claiming any right or interest in said mining property as derived from or based upon said deeds; also that plaintiffs have a writ of assistance to put them in

lawful possession of their respective interests in said mines as they were prior to the date of said deeds, and that plaintiffs also have judgment for $25,000 for their past share of the proceeds and profits of said mines when worked by defendants, together with their reasonable costs by them expended in and about this action, and grant such other general and special relief as the nature of this case may seem to warrant.

And the plaintiffs will ever pray, etc.

FORD & COX AND
A. D. DUFF,
Att'ys for Plaintiffs.

Endorsed: Filed June 9th, 1886. J. E. Walker, clerk, by C. H. Knapp, deputy clerk.

(Title of Court and Cause.)

Answer.

I.

The defendants, for answer to the complaint filed herein, admit all of the allegations of the first paragraph thereof.

II.

For answer to the 2nd paragraph of the complaint herein the defendants deny that on the 18th day of January, A. D. 1881, or at any other time or at all the said defendant, William W. Hickies, represented himself to the plaintiffs herein or to any other person or persons that he was a man of considerable business associations, and thereby induced the plaintiffs to convey to him, the said
7 William W. Hickies, their right and interest in said mines mentioned in 1st paragraph of complaint or any part of the same or of the mill site therein mentioned and described for the purpose of enabling the said defendant, William W. Hickies, to organize a joint-stock company or any company at all to develop and work said mines under the name of the Ithaca Consolidated Gold and Silver Mill and Mining Company, or any other purpose or under any other name whatever; and for answer to said second paragraph of complaint the defendants admit that on the 18th day of January, 1881, all of plaintiffs joined in a quitclaim deed whereby all the interest of the plaintiffs in and to said mines and to each and all of them was conveyed to the defendant William W. Hickies.

And, for further answer to said second paragraph, defendants admit that on said last-mentioned day said plaintiff, Charles E. Philes, conveyed by quitclaim deed the mill site in complaint mentioned to said defendant, William W. Hickies.

And, for further answer to said second paragraph, the defendants admit that on the same day that said quitclaim deed was executed and delivered by the plaintiffs to the defendant William W. Hickies, to wit, on the 15th day of January, 1881, the plaintiffs and the defendant Hickies entered into the agreement mentioned in the com-

plaint and referred to as "Exhibit A," but denies that it was for the purpose and object expressed in said second paragraph of the plaintiffs' complaint, but for the purpose and object hereinafter set out in the third paragraph of this answer.

III.

For answer to the third paragraph of complaint, deny that "Exhibit- A, B, and C" were all acknowledged and delivered contemporaneously as part of the same transaction and constituted but one contract; admit that said Hickies was interested under said agreement and deeds, with the title to said mines and mill site, as trustees of said plaintiffs, but alleges the fact to be that it was for the purposes and under the conditions hereinafter expressed in the third paragraph of this answer.

8 Admits that twenty thousand shares of the capital stock from each of said mines was to be set apart as (unassessable stock for) a working capital, and the proceeds of which was to be used for developing said mines, but alleges the fact to be that under said agreement said twenty thousand shares from each of said mines were to be sold and disposed of by said defendants before the defendants were authorized or compelled to convey and transfer on the books of the said company any shares of the capital stock of said company to the said plaintiffs or any of them; that no shares of said company greater than the number of twenty-five thousand shares have been sold by defendants or any of them.

IV.

For answer to the fourth paragraph of complaint the defendants deny that the said consideration for the execution of said deeds conveying said mines to said defendant William W. Hickies was his agreement to organize said company and to deliver to said plaintiffs three-fifths of the capital stock of said company, as alleged in the fourth paragraph of said complaint.

V.

Admit the allegations of the fifth paragraph of complaint.

VI.

For answer to the sixth paragraph of complaint the defendant denies that the capital stock of said company was fixed at six hundred thousand shares, of the par value of ten dollars each, or a greater number of shares than — number and of any greater par value to the share than — dollars to each share of the capital stock of said company; denies that 584,600 shares of said stock has been issued and transferred on the stock books of said defendant William W. Hickies, or any greater number than — shares of said capital stock.

VII.

For answer to the seventh paragraph of complaint the defendants admit the conveyance of said mines and mill site by the defendant

William W. Hickies to said corporation, as therein alleged,
9 but denies that the defendants or either of them have taken and extracted from said — ores and minerals of the value of eighty-three thousand dollars or in any value of a sum greater than two thousand seven hundred dollars; and for affirmative answer to said seventh paragraph of complaint the defendants allege the fact to be that the cost of said company to extract said ore and mineral found in said mines has been greatly in excess of the value of all ores and minerals taken therefrom; that in extracting said two thousand seven hundred dollars of ore and minerals therefrom said company has expended the sum of more than thirty thousand dollars in and about the working of said mines and the procuring of machinery therefor.

VIII.

For answer to the eighth paragraph the defendants deny that the defendants or either of them have refused to delivered shares of stock in said company to the plaintiffs herein as per terms and conditions of said agreement marked "Exhibit C" and filed with the complaint herein.

IX.

For answer to the ninth paragraph of complaint the defendants deny that the defendant William W. Hickies retains in his own right 584,600 shares of the capital stock of said company; denies that any demand has ever been made upon said company by said plaintiffs or either of them to issue any shares of stock whatever in said company to the said plaintiffs or either of them.

X.

For answer to the tenth paragraph of complaint defendants deny that 232,000 shares of the capital stock of said company should have been delivered to the plaintiff Charles E. Philes and 40,000 shares to Thomas H. Blair and 16,000 to Henry D. Polhemus, as alleged in said paragraph.

XI.

For answer to the eleventh paragraph of complaint the defendants deny that said — defendant William W. Hickies with notice
10 of any right or equities of the plaintiffs in or to the same or the mill site therein mentioned.

XII.

For answer to the twelfth paragraph of complaint the defendants admit the allegations therein contained.

XIII.

For answer to the thirteenth paragraph of complaint the defendants deny that the plaintiffs under said agreement marked "Exhibit C" in said complaint are entitled now or ever have been to

have any of the shares of the stock of said company issued to them or either of them or transferred upon the books of said company to them or either of them.

1st. Wherefore defendant prays that plaintiffs take nothing by their action herein.

2nd. That defendants may have judgments for their costs herein expended.

A. D. LEMON AND E. J. EDWARDS,
Att'ys for Defendants.

Endorsed: Filed Nov. 19th, 1886. J. E. Walker, clerk.

(Title of Court and Cause.)

Amended Answer.

And now come the defendants and, by leave of court first had and obtained, file this their amended answer, and say:

I.

That in addition to the facts and denials set up in their original answer, which they here affirm, they further by way of answer set up their affirmative facts as follows, to wit, and say:

II.

That on the 18th day of January, 1881, when plaintiffs allege that they and defendant Hickies entered into the agreement sued upon and when the plaintiffs made the deeds to said Hickies, as alleged, to be a part of the same transaction, that then plaintiffs did not have or own any of such mines or any interest therein; and defendants allege that plaintiffs represented to defendant Hickies that they had located said mining claims and had to that extent severed said claims from the public domain, and that they were then existing mining claims, located in accordance with the laws of the United States in regard thereto, and that plaintiffs were the owners in the same and had a right thereto and an interest thereof and had pretended to show monuments therefor to some of the claims and represented that all the claims were monumented according to law.

11

Whereas the facts are that defendants or none of them had ever located any of such mines; that there were no such mines or mining claims or discovery of mineral upon which to make a location at that time or before, and that in truth and in fact there were no such mines, mining claims, or locations in existence at that time owned by plaintiffs or any one else, and that the land sold by plaintiffs to defendant by said deeds or attempted to be sold were unoccupied and unlocated and unappropriated mineral lands of the United States and were at that time subject to location by any one upon discovery of mineral, all of which each and all of plaintiffs well knew, but that defendant Hickies did not then know such facts or suspicion that they existed, but relied upon the representa-

tions of plaintiffs that said mines or mining claims were actually in existence and had been actually located and that plaintiff owned them.

III.

That after said deeds and said agreement had been executed and delivered, on the 18th day of January, 1881, as described in complaint, the plaintiffs, well knowing that said ground was not located but subject to location as mining claims, jumped the same and made location of mining claims thereon in their own names with the intent of depriving defendants of the same, and took possession of all the ground sold by them to said Hickies by virtue of the locations made by them after said deeds and agreement had been executed and delivered and after defendant Hickies had taken his supposed rights and possession under said deeds.

12 IV.

Defendants further say that defendant Hickies or neither of them did not know that the claims which Hickies bought or supposed he was buying or had bought from defendants were not existing locations of mining claims until said Hickies saw and found defendants in possession of the ground as jumpers and holding it by virtue of locations made as aforesaid after said deeds and agreement had been executed and delivered and adversely to the rights of these defendants.

Whereupon such proceedings were taken that plaintiffs were removed from said ground and defendants placed in possession thereof. Whereupon defendant Hickies made lawful, valid, and regular mining locations in accordance with the laws of the United States in his own name, and subsequently deeded and transferred such locations so made by him to the defendant The Ithaca Consolidated Gold and Silver Mill and Mining Company, who now own and hold the same as the capital and the paid-up capital stock of the said corporation upon all the shares issued to the defendant Hickies or laid away for working purposes or issued to others and free from any equities in favor of plaintiffs or either of them.

V.

And defendants further say that plaintiffs are barred by a judgment between these same parties (plaintiffs and defendant Hickies) in regard to the same matter rendered in the said court in favor of the defendant Hickies and against these plaintiffs on the 15th day of October, 1883.

Wher-fore defendants ask that the action be dismissed and that they have judgment for costs.

A. D. LEMON, STREET & GOODRICH,
Att'ys for Defendants.

Endorsed: Filed March 23rd, 1887. J. E. Walker, clerk.

13 (Title of Court and Cause.)

Amendment to Answer.

And now comes defendants and by leave of court make this amendment of their answer by way of additions thereto and say—

That the cause of action set out in the complaint is barred by the statute of limitation as against both and all of defendants; that the same arose more than four years before the bringing of this action, and therefore pray to be dismissed with their costs.

A. D. LEMON, STREET & GOODRICH,
Att'ys for Defendants.

Endorsed: Filed March 23rd, 1887. J. E. Walker, clerk.

(Title of Court and Cause.)

Stenographer's Notes.

Transcript of short-hand notes of testimony, etc., taken upon the trial of the above-stated cause at the court-house, in the city of Phœnix, Maricopa county, Arizona Territory, on Tuesday, the twenty-second day of March, A. D. 1887, in the presence of Hon. Wm. W. Porter, associate justice, sitting without a jury.

Appearances: A. D. Duff, Esq., and Messrs. Ford & Cox, for plaintiffs; A. D. Lemon, Esq., E. J. Edwards, Esq., and Webster Street, Esq., for defendants.

Counsel for the defendants ask leave to file an amendment to the answer setting forth the statute of limitations, which leave is granted by the court.

Counsel for the defendants admit that the copies of the deeds alleged and set forth in the complaint are true copies of the originals and admit that they are the original deeds.

Mr. Duff opens the case for the plaintiffs and reads Exhib-
14 its "A," "B," "C," and "D," which are contained in the amended complaint, and the following testimony was introduced:

HENRY L. WHARTON, being sworn and examined on the part of the plaintiffs, testified as follows:

Direct examination by Mr. FORD:

Q. What office do you hold in this county, Mr. Wharton?
A. County recorder.
Q. Do you have the custody of the books?
A. Yes, sir.
Q. What book is that you have?
A. Book 8 of Deeds.
Q. Is there a deed recorded there from W. W. Hickies to the Ithaca Consolidated Gold and Silver Milling and Mining Company?
A. Yes, sir; on page 300, Book 8 of Deeds.

(By the COURT:)

Q. Same mines described in the complaint, Mr. Ford?

Mr. FORD: Yes, sir.

(Not cross-examined.)

CHARLES E. PHILES, being sworn and examined on the part of the plaintiffs, testified as follows:

Q. Are you one of the plaintiffs in this action?

A. Yes, sir.

Q. Have you ever made any demand for your shares or the shares of stock required to be delivered to you and the other plaintiffs by virtue of an agreement made with W. W. Hickies in regard to the six mines and the mill site involved in this action?

A. Yes, sir.

Q. Was it before this action was commenced?

A. Yes, sir; a long time before.

Q. Was that demand complied with?

A. No, sir.

Q. Did you ever make any demand upon William Grainger, the secretary of the Ithaca Consolidated Gold and Silver Milling and Mining Company?

A. No, sir.

Q. Did you ever bring an action in this court against this
15 defendant Hickies or The Ithaca Consolidated Gold and Silver Milling and Mining Company, corporation, defendant, for the stock agreed to be delivered to you by the agreement in regard to your sale of these mines to Hickies?

Mr. STREET: If the court please, this is a very improper question.

By the COURT: What is the object of introducing this, Mr. Ford? Counsel withdraws the question.

Cross-examination:

X Q. When was it you made the demand?

A. In Phœnix.

X Q. When was it?

A. I think it was in the fall after the sale was made.

X Q. Of whom?

A. Of Dr. Hickies.

X Q. The same fall that you made the deed?

A. I made the deed in the winter; yes, sir.

By the COURT: Was Dr. Hickies the president of this association or corporation when you made the demand?

A. Yes, sir; I think so; that was the arrangement.

Q. Did he give you any reasons?

A. No, sir; not me. He did not give me any reasons why he should not give me the stock.

By Mr. FORD:

Q. Was this demand made in the fall of 1881?

A. I think so.

Q. Was it after you had knowledge of the incorporation of this company?

A. Yes, sir.

Counsel resuming:

X Q. Where were you working when this demand was made?

A. I don't think I was working anywheres.

X Q. Where were you living?

A. I was living in Phœnix. I went to New York in the winter and I came back in July, 1881.

X Q. When did you go?

A. I don't remember when; in the winter some time.

16 X Q. How long after the deed was made?

A. I don't remember that.

X Q. How long before?

A. I made the deed before I went away.

X Q. What did you say to Dr. Hickies when you asked him if he was going to give you the stock?

A. I simply asked him if he was going to give them to me. It was in Dr. Wharton's office. He had his office there when he was here.

X Q. He put you off, did he?

A. Yes, sir.

X Q. Then, as I understand you, this simply came up in the conversation between you and him?

A. I also made a demand upon Frank Cox.

X Q. Is he an officer of the company?

A. No; I made a demand through him.

Dr. J. E. WHARTON, being sworn and examined on the part of the plaintiffs, testified as follows:

Q. Dr. Wharton, did you ever have any conversation with one Dr. Hickies in regard to Charles E. Philes', C. E. Blair's, and H. D. Polhemus' interest in six certain mines and the mill site in Cave Creek mining district, in this county?

Mr. STREET: We object to this. There is no foundation laid for it. If this witness was not acting as the agent of Dr. Hickies, his testimony on this would be irrelevant.

By the COURT: Were Philes and this gentleman, Hickies, together at the time?

A. Philes was not present. Dr. Hickies made his headquarters at my office in 1881—part of it—after the sale was made.

Mr. STREET: Does the court say that is proper testimony?

By the COURT: Yes, sir.

Mr. STREET: We note our exception to that.

Counsel resuming:

Q. Let us understand whether Dr. Hickies was present when this conversation was had.

A. Yes, sir; Philes was not present.

17 By the COURT: What did he say about a demand being made on him?

A. He was speaking of the contract between them; the contract was so worded that he did not accede to Philes' demand, and need not unless he pleased.

Cross-examination:

X Q. Was anything said about a demand by Dr. Hickies?

A. Nothing more than that the contract was so worded that he need not accede to it unless he so pleased.

FRANK COX, Esq., being sworn and examined on the part of the plaintiffs, testified as follows:

Q. Mr. Cox, were you ever agent or attorney for C. E. Philes, the plaintiff in this action?

A. Yes, sir; the firm of Cox & Campbell were at one time—that is, at that time we so considered it. Our connection was with this action, or some suit just the same; it was in reference to Philes' mining claims on Cave creek, and with which Dr. Hickies was connected some way—by deeds or otherwise.

Q. Did you at any time prior to March, 1886, make any demand upon Dr. Hickies for the shares of stock of this company?

A. Well, I don't remember the date; I made no note of it. It was at the time (interrupted)——

Q. Was it before I and Judge Cox began this action?

A. Yes, sir; it was before we drew the complaint, and I am satisfied it was before you filed the complaint in this action that I said something to him about the demand, and I will tell you what I did. At this time Dr. Hickies came into my office with two or three other gentlemen, and from there they went up into the cupola, and when they passed down, that is the first time I ever mentioned the matter to Dr. Hickies. I think I stated to him there in substance that we represented Philes in the matter, and we desired to stop. I forget what he did answer, but he gave me to understand that he would stop, and I so reported his answer to Philes. I think I reported that to Philes that afternoon. After I had reported that to

18 Philes, and while Dr. Hickies was still at the hotel, and I won't be sure whether it was that week or not, I went to see him at the hotel about it, and could not get any satisfaction from him. I gathered from what Dr. Hickies told me at first that he would arrange the matter with Philes, and whether I served a demand upon him or not I cannot swear to.

Cross-examination:

X Q. Did you make a demand for any specific amount of stock?

A. I am not sure whether I had the number of shares of stock or not. I simply made the demand for the amount of stock of the company. I will state I don't think I stated any number of shares, but if we served any written notice on him we may have stated the number of shares.

J. A. MOORE, being sworn and examined on the part of the plaintiffs, testified as follows:

Q. Mr. Moore, are you a stockholder in the Ithaca Consolidated Gold and Silver Milling and Mining Company?
A. I am.
Q. Who is the president of the company?

Mr. STREET: We object to that as illicit testimony.
Mr. FORD: I want to show that Dr. Hickies has been since 1879.
Mr. STREET: It is not a proper issue.
Mr. FORD: We want to show that at the time this demand was made Dr. Hickies was president of the company.

Q. Who has been president of this company since its organization?
A. I don't know at that time who was.
Q. Who was the president in 1882?

Mr. STREET: We object to proving it in this way.

By the COURT: Who was president?
A. I have no knowledge of the presidency up to 1884.
Q. Who has been president since 1884?
A. Dr. Hickies.

Mr. STREET: We object.

19 The objection is overruled by the court; to which ruling counsel for defendants duly notes his exceptions.

Cross-examination:

X Q. How long has Dr. Hickies been president of the Ithaca Consolidated Gold and Silver Milling and Mining Company according to your knowledge?
A. Since 1884.
X Q. What time in 1884?
A. In October—the last of October, 1884.

Dr. WM. W. HICKIES, being sworn and examined, testified as follows:

Q. Who do you know is president of the Ithaca Consolidated Gold and Silver Milling and Mining Company?
A. I don't understand the question.
Q. Who is the president of the Ithaca Gold and Silver Milling and Mining Company?
A. I am supposed to be president.
Q. Well, are you the president?
A. Well, yes.
Q. Who has been the president of that company since 1881?
A. I have.

(Not cross-examined.)

Mr. FORD: We rest here.

Mr. DUFF: I offer in evidence a sworn answer by Dr. Hickies in a suit in this court—one somewhat similar to this suit.

By the COURT: Wait till rebuttal.

By DEFENDANT:

Mr. STREET: We offer in evidence a paper that was filed by one of the plaintiffs, Thos. Blair, Oct. 20, 1886.

Mr. FORD: I object to its introduction.

Said paper is marked by the reporter Exhibit "I" and is as follows:

20 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

CHARLES E. PHILES *et al.*
vs.
WM. W. HICKIES.

I hereby withdraw from the above-entitled case, and hereby authorize the said action to be dismissed of record so far as my interest therein is concerned.

Oakland, Cal., Oct. 14, 1886.

T. H. BLAIR.

STATE OF CALIFORNIA, *County of Alameda,* } *ss:*

On this fourteenth day of October, one thousand eight hundred and eighty-six, before me, Newton Benedict, a notary public in and for said Alameda county, residing therein, duly commissioned and sworn, personally appeared T. H. Blair, known to me to be the person described in and whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the city of Oakland, county of Alameda, the day and year first above written.

[SEAL.] NEWTON BENEDICT,
Notary Public.

(Endorsed:) Filed Oct. 20th, 1886. J. E. Walker, clerk.

Mr. STREET: Upon this testimony, if the court please, we will rest the case.

Testimony closed.

21 EXHIBITS BY PLAINTIFF'S DEEDS.

"EXHIBIT A."

This indenture, made the fifteenth day of January, in the year of our Lord one thousand eight hundred and eighty-one, between Charles E. Philes, Thomas H. Blair, and Henry D. Polhemus, of

Phœnix, Maricopa county, Arizona Territory, parties of the first part, and William W. Hickies, of New York city, New York State, the party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, and forever quitclaim-, and by these presents do grant, bargain, and sell, remise. release, and forever quitclaim, unto the said par*ties* of the second part and to his heirs and assigns the following mines, known as the "Pinto, Mexican, Bonito, Silver Monarch," the "Boss and Spring mine," situated at the Cave Creek mining district, Maricopa county, Arizona Territory.

The notices of location of which are recorded in Phœnix, Maricopa county, in the hall of records, as follows:

The "Pinto," recorded, at the request of C. E. Philes, May the 17th, 1880, at 45 minutes past one p. m., Book 2 of Mining Claims, page 145, 146, records of Maricopa county, Arizona Territory, signed W. F. McNulty, county recorder.

The "Mexican," filed, at the request of C. E. Philes, June 2nd, 1880, at the hour of 2.30 p. m., page 155, Book 2 of Mining Records, and signed by W. F. McNulty, county recorder.

The "Bonito," recorded, at the request of Chas. E. Philes, October 4th, 1880, at 11 a. m., Book 2, page 197, of mining claims records, signed W. F. McNulty, county recorder.

The "Silver Monarch," filed for record, at request of C. E. Philes, December the 17th, 1880, at 2 p. m., recorded in Book 2 of Mining Claims Records, *and* page 202, signed W. F. McNulty, county recorder.

22 The "Boss" mine, recorded, at the request of T. H. Blair, January the 15th, 1881, at 1.30 p. m., page 215, 216, Book 2 of Mining Records, signed R. F. Kirkland, county recorder.

The "Spring" mine, filed for record, at the request of C. E. Philes, January the 15th, 1881, at 9 a. m.; recorded in Book 2, *and* page 214; signed R. F. Kirkland, county recorder.

For full descriptions reference is made to the records as above given, all of which are recorded in Phœnix, Maricopa county, Arizona Territory, together with all the dips, spurs, and angles and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant therewith usually had and enjoyed, and also all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits thereof, and also all the estate, right, title, interests, property, possession, claim, and demands whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hand- and seals the day and year first above written.

CHAS. E. PHILES. [SEAL.]
THOS. H. BLAIR. [SEAL.]
HENRY D. POLHEMUS. [SEAL.]

Signed, sealed, and delivered in the presence of—
R. F. KIRKLAND.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

On this the 18th day of January, A. D. 1881, before me, county recorder in and for the county of Maricopa, personally appeared Charles E. Philes, Thomas H. Blair, and Henry D. Polhemus, each personally well known to me to be the persons who executed
23 the annexed instrument as parties thereto, and who acknowledged to me that they each of them respectively executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have set my hand and affixed my official seal the day and year in this acknowledgment first above written.

[SEAL.] R. F. KIRKLAND,
County Recorder.

"EXHIBIT B."

This indenture, made the 18th day of January, in the year of our Lord one thousand eight hundred and eighty-one, between Charles E. Philes, of Phœnix, Maricopa county, Arizona Territory, party of the first part, and Wm. W. Hickies, of New York city and State of New York, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, and forever quitclaim-, and by these presents do grant, bargain, sell, remise, release, and forever quitclaim, unto the said party of the second part and to his heirs and assigns a certain mill site situated in Cave Creek district, Maricopa county, Arizona Territory, known as the Ithaca Consolidated Gold and Silver Mill and Mining Company mill site, the notice of location of which is filed for record at the request of Charles E. Philes January the 18th, 1881, at the hour of 9 a. m., Book 2 of Miscellaneous Records, page 162, of Maricopa County, Arizona Territory, a full description of which can be had and reference thereto is hereby made; to have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, *and* to the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

CHARLES E. PHILES. [SEAL.]

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

On this 18th day of January, 1881, before me, R. F. Kirkland, county recorder in and for the county of Maricopa, personally appeared Charles E. Philes, personally known to me to be the person who executed the annexed instrument as a party thereto, and who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[SEAL.] R. F. KIRKLAND,
County Recorder.

Recorded at the request of Charles E. Philes January 18th, 1881, at 50 minutes past 11 a. m.

R. F. KIRKLAND,
County Recorder.

EXHIBIT BY PLAINTIFF.

Copy of Agreement.

This agreement, made this the eighteenth day of January, in the year of our Lord one thousand eight hundred and eighty-one, between William W. Hickies, of the city of New York and State of New York, party of the first part, and Charles E. Philes, Thomas H. Blair, and Henry D. Polhemus, all of Phœnix, Maricopa county, Territory of Arizona, parties of the second part, witnesseth:

That the said William W. Hickies, in consideration of a certain deed of mining property to him made the fifteenth day of January, one thousand eight hundred and eighty-one, and also of a certain deed of the Ithaca Consolidated Gold and Silver Mill and Mining Company mill site by the parties of the second part, copies of which can be seen recorded in the recorder's office, at Phœnix, in the records of deeds, in Maricopa county, Arizona Territory, reference to same alluded to hereby, witnesseth:

That party of the first part agrees to deliver to each of the parties of the second part stock to amount of shares not to exceed three-fifths of the whole stock of the mill and mining company property hereafter to be called the Ithaca Consolidated Gold and Silver Mill and Mining Company.

Also that the party of the first part hereby acknowledges that the above deeds were given him in trust to form such a company, name and style of which is above given, and the consideration for such deeds was the fulfillment of the above stock to be issued to each one and all of the parties of the second part.

The parties of the second part witnesseth that such deeds were given for the consideration of so many shares of the capital stock of above-named company, each and all shares so issued to said parties to be strictly and severally unassessable, and also that the consideration of one dollar stated in the deeds to be held for that sum

only, together with the shares to be issued to make up the whole consideration.

These shares of stock are to be placed to the credit in the books of the company to Henry D. Polhemus, Charles E. Philes, Thomas H. Blair after twenty thousand shares from each mine of the consolidation or incorporation is set aside especially for working purposes and to defray all the necessary expenses of the company, so that it shall not be necessary to place any assessment on the capital stock; and, furthermore, that those shares be placed to the credit of named Henry D. Polhemus, Charles E. Philes, and Thomas H. Blair in the stock ledger after the working capital stock is disposed of according to this agreement.

(Signed) CHARLES E. PHILES. [SEAL.]
THOMAS H. BLAIR. [SEAL.]
HENRY D. POLHEMUS. [SEAL.]
WM. W. HICKIES. [SEAL.]

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

On this 18th day of January, A. D. 1881, before me, R. F. Kirkland, county recorder in and for the county of Maricopa, personally appeared Charles E. Philes, Thomas H. Blair, and Henry D. Polhemus and W. W. Hickies, each personally well known to me and known to be the persons who executed the annexed instrument
26 as parties thereto, and who acknowledged to me that they each of them respectively executed the same freely and voluntarily and for the uses and purposes *es* therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[SEAL.] R. F. KIRKLAND,
County Recorder.

Endorsed: Contract. Filed for record at request of Charles E. Philes January 18th, 1881, at the hour of two o'clock and thirty minutes. Recorded in Book 2 of Miscellaneous Records of Maricopa County, A. T., pages 162, 163, and 164. H. F. Kirkland, county recorder.

(Title of Court and Cause.)

Findings of Fact and Conclusions of Law.

And now, on this 7th day of June, A. D. 1887, being one of the judicial and court days of said term, the court, having had this cause under advisement since the last term, when it was heard and tried by the court without a jury;

And the court having in the meantime duly considered the evidence and arguments of counsel and being fully advised in the premises, doth now, from the allegations in the complaint not specifically denied, admissions in the answer, exhibits, and evidence, find the following facts:

I.

That on the 18th day of January, 1881, the plaintiffs in this action, as the owners of the property hereinafterwards described, by their joint deed, for the alleged nominal consideration of one dollar, conveyed to Wm. W. Hickies, one of the defendants in this action, certain mining property, to wit, six mining claims and one mill site, described in said deed of conveyance as follows, to wit: The
"Pinto," "Mexican," "Bonito," "Silver Monarch," "Boss,"
27 and "Spring mine," in Cave Creek district, Maricopa county, Territory of Arizona, the notices of locations of which are recorded as follows: The Pinto, recorded at the request of Charles E. Philes May 17th, 1880, at 45 minutes past one o'clock p. m., Book 2 of Mining Claims, page- 145–146, Record of Maricopa County, Arizona Territory, signed by W. F. McNulty, county recorder.

The Mexican, filed at request of C. E. Philes June 2nd, 1880, at the hour of two thirty p. m., page 155, Book 2 of Mining Records, and signed W. F. McNulty, county recorder.

The Bonito, recorded at request of C. E. Philes October 4th, 1880, at 11 o'clock a. m., Book 2, page 197, of Mining Claims Records, signed W. F. McNulty, county recorder.

The Silver Monarch, filed for record at request of C. E. Philes Dec. 17th, 1880, at 2 o'clock p. m., recorded in Book 2 of Mining Claims Records, page 202, signed W. F. McNulty, county recorder.

The Boss mine, recorded at the request of T. H. Blair January 15th, 1881, at 1.30 p. m., page- 215–216, Book 2 of Mining Records, signed R. F. Kirkland, county recorder.

The Spring mine, filed for record at the request of C. E. Philes January 15th, 1881, at 9 o'clock a. m., recorded in Book 2 and page 214, signed R. F. Kirkland, county recorder.

And at the same time said Charles E. Philes by another deed conveyed to said Hickies a certain mill-site claim as part of said mining property, described in the deed as "a certain mill site situate in Cave Creek district, Maricopa county, Territory of Arizona, known as the Ithaca Consolidated Gold and Silver Mill and Mining Company mill site," the notice of location of which is filed at the request of C. E. Philes January 18th, 1881, at the hour of nine o'clock a. m., Book 2 of Miscellaneous Records, page 162, of Maricopa County, Arizona Territory, which deeds were recorded the same day by the county recorder of said county.

II.

28 That at the same time said deeds were executed and as part of the same transaction a written agreement was made and acknowledged by said Hickies and the plaintiffs, declaring said conveyances were made in trust to enable said Hickies to organize a joint-stock company, to be named the "Ithaca Consolidated Gold and Silver Mill and Mining Company," for the purpose of working and developing said mining property; that 120,000 shares of the capital stock of such company were to be set apart as the working stock of the company; and said Hickies, in consideration of said

deeds, when the company was organized was to issue and deliver to the plaintiffs, and place the same to their credit on the stock books of the company as unassessable stock, three-fifths of the whole capital stock which might remain after deducting the said 120,000 shares of working stock, and the fulfillment of these promises on the part of the said Hickies was the real consideration for which these deeds were made by the plaintiffs; and this agreement was recorded the 18th day of January, 1881, by the county recorder of Maricopa county, Territory of Arizona.

III.

That said Hickies took the title to said mining property from the plaintiffs expressly in trust for the purpose of organizing said company and issuing stock as aforesaid to the said plaintiffs.

IV.

That July 21st, A. D. 1881, said Hickies procured the organization and incorporation of said company, by the name of the "Ithaca Consolidated Gold and Silver Mill and Mining Company," for the purposes aforesaid, for the term of fifty years, fixing the capital stock at six million dollars, divided into 600,600 shares of the par value of ten dollars each; and said Hickies in his own name took and subscribed for 584,000 shares of said stock, all of which remains unissued except about 25,000 shares. At the organization of said company said Hickies was elected president thereof, and has been such president ever since and is now the president of said company, and that said corporation by its said corporate name is codefendant with the said William W. Hickies in this action.

29 V.

That on the 30th day of September, A. D. 1882, said Hickies, for the purpose of investing said corporation with the legal title to said mining property, conveyed the same to it, and said corporation at once took possession of the property and now holds the same under the deed; that when said Hickies made such deed to the said corporation he was president of the same, and that said corporation took said deed and conveyance with notice and full knowledge of the rights of the plaintiffs in the premises and of the existence, terms, conditions, and purposes of the said written agreement between said Hickies and plaintiffs.

VI.

That when the plaintiffs conveyed said mines to William W. Hickies they did not own equal interests therein, but as tenants in common each of them owned an undivided third part of the Boss mine; Charles E. Philes and Thomas H. Blair, as tenants in common, each owned an undivided half in the Bonito mine, and said Philes, in his own right, owned the other four mines; that the several interests of the plaintiffs in the six mines as a unit and

when consolidated were Henry D. Polhemus, $\frac{2}{3}\frac{2}{6}$ equal parts; Thomas H. Blair, $\frac{5}{3}\frac{5}{6}$ equal parts, and Charles E. Philes, $\frac{2}{3}\frac{9}{6}$ equal parts.

That between the plaintiffs each mine is considered of the same value, and each plaintiff claims stock according to his interest in the six mines as a unit.

VII.

After deducting the said working stock (120,000 shares) from the capital stock of the company (600,000 shares) three-fifths of the remainder is 288,000 shares, which, divided between the plaintiffs in proportion to their interests in the six mines, would give Henry D. Polhemus 16,000, Thomas H. Blair 40,000, and Charles E. Philes 232,000 shares of said stock.

VIII.

That defendants have neglected to issue and deliver to the plaintiffs or either of them any stock of said company or give them credit on the stock books of the company for any such stock.

That plaintiff Philes before the commencement of this action demanded his share of said stock from William W. Hickies, the president of the company, who neglected to comply with such demand.

And as conclusions of law from the foregoing facts the court now hereby finds and decides—

I.

That no limitation, law, or lapse of time bars the enforcement of an express trust.

II.

That a reasonable time had intervened between the organization of said company and the commencement of this action for the defendants to have issued and delivered said stock to the plaintiffs, and that no demand for it was necessary before bringing this action.

III.

That by the deed of said Hickies the said Ithaca Consolidated Gold and Silver Mill and Mining Company took and now has no better title to said mining property as against the plaintiffs in this action than said William W. Hickies had.

IV.

That the plaintiffs are justly entitled to receive 288,000 shares of paid-up and unassessable stock of the capital stock of said company, the stock or certificates therefor to be issued and delivered to them as follows: Charles E. Philes, 232,000; Thomas H. Blair, 40,000, and Henry D. Polhemus, 16,000 shares, and each of them to have the same credited to them severally on the stock books of said company.

V.

That the defendants ought to issue and deliver said stock and place the same to the credit of the plaintiffs upon the stock books of the company as aforesaid or surrender and return said mining property and the possession thereof to the said plaintiffs.

VI.

That according to right and justice the plaintiffs are en-
31 titled to a decree in this respect, as prayed for in their complaint, and also to a judgment for their costs, to be taxed herein against said defendants; wherefore judgment is hereby ordered to be entered accordingly.

This 7th day of June, A. D. 1887.

WM. W. PORTER,
Judge of said Court.

Endorsed: Filed July 11th, 1887. J. E. Walker, clerk.

(Title of Court and Cause.)

Copy of Minutes of the Trial.

And now, on this 22nd day of March, A. D. 1887, being one of the *the* judicial and court days of said term, this cause came on in due course of law to be tried before the Honorable W. W. Porter, presiding judge of said court, in the presence of counsel for both plaintiffs and defendants; and by agreement of the parties the cause is submitted to the court, without intervention of a jury, upon the complaint, answers, exhibits, and evidence which were now submitted to and heard by the court; and thereupon, and after hearing the same, the court ordered that the argument of this cause be postponed until the 24th instant.

And now again, on this 24th day of March, A. D. 1887, being one of the judicial and court days of said term, come again into open court A. D. Duff and J. B. Ford, attorneys for the plaintiffs, and A. D. Lemon and Webster Street, attorneys for defendants, and, in pursuance of the order made in this case 22nd instant, this cause was now argued before the court on the part of the plaintiffs by the said Duff and Ford and on the part of the defendants by the said Lemon and Street, and after hearing said arguments the court thereupon took the said cause under advisement.

32 (Title of Court and Cause.)

Judgment.

And now, on this 7th day of June, A. D. 1887, being one of the judicial and court days of said term, this cause having been taken under advisement by the court March 24th, A. D. 1887, and the court in the meantime having duly considered the evidence and arguments of counsel in the case, and being now fully advised in the premises and the findings of fact and conclusions of law, and

the decision thereon in writing having been duly rendered by the court, which are now on file in this cause, wherein judgment was awarded in favor of the said plaintiffs and against said defendants, and for their costs, it is now therefore hereby ordered, adjudged, and decreed that the said Ithaca Consolidated Gold and Silver Mill and Mining Company, one of the defendants in this action, issue and deliver to Charles E. Philes, one of the plaintiffs in this action, stock or certificates of stock, at his option, to the amount of 232,000 shares unassessable and paid-up stock of the capital stock of said company, and also place the same to his credit on the stock books of said company; and that said defendant issue and deliver to Thomas H. Blair, one of the plaintiffs in this action, stock or certificates of stock, at his option, to the amount of 40,000 shares paid-up and unassessable stock of the capital stock of said company and place the same to his credit on the stock books of said company; and that said defendant also issue and deliver to Henry D. Polhemus, the other plaintiff in this action, stock or certificates of stock, at his option, to the amount of 16,000 shares paid-up and unassessable stock of the capital stock of said company, and also place the same to his credit on the stock books of said company.

That said stock or the certificates thereof be duly made out and signed by the proper officers of said corporation, so as to pass to and lawfully invest said plaintiffs with the right and legal title to said stock; and that such stock be so issued and delivered to the respective parties or their lawfully authorized agents within 30 days from the date of filing this decree; and that said parties be so credited with the said several amounts on the stock books of said company within a like period of 30 days from the date of filing this decree.

33

And it is further ordered, adjudged, and decreed that if such stock is not so issued and delivered to the respective plaintiffs and each of them credited therewith as unassessable and paid-up stock on the stock books of said company within the time aforesaid, then the deed made by the plaintiffs, bearing date 15th January, A. D. 1881, and acknowledged and recorded 18th January, 1881, conveying six certain mining claims, known as the Pinto, Mexican, Bonito, Silver Monarch, Boss, and Spring mines, to the said William W. Hickies; the deed of Charles E. Philes, dated, acknowledged, and recorded 18th January, 1881, conveying a certain mill site, known as the Ithaca Consolidated Gold and Silver Mill and Mining Company mill site, to the said William W. Hickies; also the deed made by the said William W. Hickies, bearing date 30th day of September, A. D. 1882, conveying all said mining property to the said Ithaca Consolidated Gold and Silver Mill and Mining Company, be, and the same are hereby, absolutely void, of none effect, and held for nothing esteemed as against these plaintiffs and each and all of them, their heirs and assigns; and that said defendants, their agents, servants, attorneys, and employés, shall thereupon and at once yield up and surrender the possession of all said mining property, together with the appurtenances, to the plaintiffs, shall, upon each failure to issue and deliver said stock or the certificates thereof and

give credit therefor as aforesaid, be at once reinvested with and restored to all their former rights and interests which they jointly or severally had in any or all of said mining property prior to making said deed, as fully and absolutely as against these defendants and their assigns as if said deeds had never been made, and may have a writ of assistance from this court to recover possession thereof against the defendants and all parties claiming through or under them.

And it is further adjudged and decreed that the plaintiffs have and recover judgment against said defendants for their costs by them laid out and expended in and about the prosecution of
34 this action, amounting to the sum of eighty-nine and $\frac{35}{100}$ dollars, and that they have execution therefor, etc.

WM. W. PORTER,
Judge of said District Court.

Endorsed: Filed July 11th, 1887. J. E. Walker, clerk.

(Title of Court and Cause.)

Motion for a New Trial.

And now comes the defendants and moves the court for a new trial of said cause, for that the findings of facts and the conclusions of law and the judgment of the court are contrary to the law and the evidence.

Sept. 1st, 1887.

STREET & GOODRICH, A. D. LEMON,
Att'ys for Defendant-.

Specifications of Particulars in Which the Evidence is Insufficient.

I.

There is no testimony to support the second, third, fifth, sixth, seventh, and eighth findings of fact.

II.

That it is nowhere shown that plaintiffs were collectively entitled to 288,000 shares of stock from the Ithaca Company or from Hickies, or that defendant Philes was so entitled to 232,000 shares, Blair to 40,000, or Polhemus to 16,000 shares each at the time of suit or now.

III.

It is nowhere shown that any of defendants were in a situation where it were possible for them to have set apart or deliver any stock to any of the plaintiffs, even if they were obligated to do so.

IV.

It is nowhere shown but that all the stock sought to be ob-
35 tained had already been placed to the credit of each of the plaintiffs on the books of the company, and that Blair and

Polhemus had actually received certificates for their respective shares.

V.

The shares belonging to Blair should not have been included in the judgment after he had filed his acknowledgment of satisfaction and asked that the suit be dismissed as to him.

VI.

That the action of the plaintiffs had been barred by the statute of limitations.

VII.

That none of the defendants ever had known or had been informed how much stock was to have been issued to each of plaintiffs respectively or that they had settled that among themselves.

Wherefore they ask for a new trial.

A. D. LEMON,
STREET & GOODRICH,
Att'ys for Defendant.

CHARLES E. PHILES *et al.*
vs.
WM. W. HICKIES *et al.*

The foregoing statement is agreed to and settled by the court as copies of the pleadings, evidence, and exhibits used on the trial, the minutes of the trial, findings of fact, conclusions of law, judgment, and motion for a new trial.

Nov. 9th.

WM. W. PORTER,
District Judge.

(Title of Court and Cause.)

Minute Order.

NOVEMBER 9TH, 1887.

36 This cause coming on to be heard upon the settlement of statement of motion for a new trial this 9th day of November, A. D. 1887, the statement as filed by defendant was signed and settled by the court, and thereupon, the motion being heard, *and* the court, being fully advised in the premises, overruled defendant's motion for a new trial; whereupon defendant excepted to the ruling and in open court gave notice of appeal to the Supreme Court.

W. W. PORTER, *Judge.*

(Title of Court and Cause.)

Assignment of Errors by Defendants and Appellants on Appeal to the Supreme Court.

I.

The court erred in overruling defendants' motion for a new trial and for not allowing defendants a new trial for the reasons stated in the motion.

II.

The court erred in the findings of fact and the rendering a judgment at all for the plaintiffs for the reasons set out in the specifications of the particulars in which the evidence is insufficient.

III.

The findings of fact and judgment are contrary to and unsupported by the evidence.

Wherefore defendants take this appeal and ask for a reversal of said judgment, and that upon the evidence judgment be rendered for defendants.

STREET & GOODRICH AND A. D. LEMON,
Attorneys for Defendants.

Endorsed: Filed Dec. 20th, 1887. J. E. Walker, clerk.

(Title of Court and Cause.)

Appeal Bond.

37 Whereas the defendants in the above-entitled action have appealed to the supreme court of the Territory of Arizona from a judgment made and entered against them in the said action in the district court in favor of the plaintiffs in the said action on the 11th day of July, 1887, for the recovery of the possession of certain mining stocks mentioned therein or the possession of certain mining claims therein described and eighty nine $\frac{35}{100}$ dollars, costs of suit, and from the order of said court overruling a motion for a new trial therein made on the 9th day of November, 1887:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, N. A. Morford and H. Ohnick, of said county of Maricopa and Territory of Arizona, do hereby jointly and severally undertake and promise, on the part of the appellants, that the said appellants shall prosecute their said appeal with effect; and in case the judgment of the appellate court shall be against them, then they shall perform its judgment or decree and pay all such damages as may be awarded against them upon the appeal.

To which amount we acknowledge ourselves jointly and severally bound; and whereas the appellants are desirous of staying the execution of the said judgment so appealed from in so far as relates to the delivery of the possession of the said mining claims and prem-

ises, we do further, in consideration therefor and of the premises, jointly and severally undertake and promise and do acknowledge ourselves further jointly and severally bound unto the said appellors to pay to said appellors the value of the rent of such property in any suit which may be brought therefor, not exceeding the sum of five hundred dollars.

That during the possession of such property by the appellants they will not commit or suffer to be committed any waste thereon.

N. A. MORFORD.
H. OHNICK.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

N. A. Morford and H. Ohnick, being duly sworn, each for
38 himself says that he is a surety in the foregoing undertaking, and each for himself says that he is worth double the amount for which he has become surety on this bond, in property not exempt from execution.

N. A. MORFORD.
H. OHNICK.

Subscribed and sworn to before me this 28th day of November, 1887.

[SEAL.] J. E. WALKER,
Clerk District Court.

Endorsed: Approved and filed Nov. 28th, 1887. J. E. Walker, clerk.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, J. E. Walker, clerk of the district court, second judicial district, Territory of Arizona, in and for the county of Maricopa, do hereby certify the above and foregoing to be a full, true, and correct copy of the amended complaint, answer, amended answer, amendment to answer, stenographer's notes, finding of facts, and conclusions of law, minutes of the trial, judgment, motion for a new trial, minute order overruling motion for a new trial, assignment of errors, and appeal bond case No. 591, entitled Charles E. Philes, Thomas H. Blair, Henry D. Polhemus, plaintiffs, *vs.* Wm. W. Hickies and The Ithaca Consolidated Gold and Silver Mill and Mining Company, defendants.

Witness my hand and the seal of said district court this 21st day of December, 1887.

[SEAL.] J. E. WALKER, *Clerk.*

39 *Minute Entries.*

In the Supreme Court of the Territory of Arizona.

Court met, Tuesday, January the 10th, 1888, at 10 o'clock a. m., pursuant to adjournment.

Present: His hon. James H. Wright, C. J.; his hon. Wm. W. Porter, A. J.; his hon. Wm. H. Barnes, A. J.; deputy U. S. marshal, and E. B. Dodge, clerk.

CHARLES E. PHILES *et al.*, Pls'ffs & Resp'ts,
vs.
WILLIAM W. HICKIES *et als.*, Defendant- & App.

On motion of attorneys and by order of the court this cause is placed upon the calendar; and by motion of attorneys and by order of the court this cause is continued until the March term, 1888.

Court adjourned.

40 Court met, Tuesday, March 13th, 1888, pursuant to adjournment.

Present: His hon. James H. Wright, C. J.; Wm. H. Barnes and W. W. Porter, A. J.; U. S. dist. attorney, U. S. marshal, by deputy, and E. B. Dodge, clerk.

CHARLES E. PHILES *et al.*
vs.
WILLIAM W. HICKIES *et al.*

On motion of att'y for resp't- it is by the court ordered that A. D. Duff be allowed 20 days in which to file his brief herein.

Court adjourned.

JAMES H. WRIGHT,
Chief Justice.

41 Court met, Wednesday, March 14th, 1888, pursuant to adjournment.

Present: His hon. James H. Wright, C. J.; W. H. Barnes, A. J., and W. W. Porter, A. J.; U. S. attorney, U. S. marshal, by deputy, and E. B. Dodge, clerk.

CHARLES E. PHILES *et al.*
vs.
WILLIAM W. HICKIES *et al.*

Att'ys for app't- move the court for leave to file amendment to transcript, and by consent of att'ys the court ordered the amendment filed, and, on motion of att'ys, the cause was, by order of the court, submitted.

Court adjourned.

JAMES H. WRIGHT, *C. J.*

42 *Opinion.*

In the Supreme Court of the Territory of Arizona.

CHARLES PHILES, THOMAS A. BLAIR, and HENRY D. POLHEMUS
vs.
WILLIAM W. HICKIES and ITHICA CONSOLIDATED GOLD AND SILVER MILL AND MINING COMPANY.

Opinion by BARNES, *A. J.*:

This is an appeal from the district court of 2nd judicial district of Arizona in and for the county of Maricopa.

The facts of the case are about these: January 18th, 1881, the Philes owned four certain mining claims and a mill site near them; he and Thomas H. Blair each owned an undivided half of another, and he, Blair, and Polhemus each owned an undivided third of another. These mining claims all lay in a group adjoining each other in the Cave Creek mining district aforesaid. Plaintiffs conveyed all their interests in these six mining claims to William W. Hickies, one of the defendants in this action, and Philes also conveyed to him the mill site, and to save the expense of several deeds they all joined in the same deed, conveying all their rights in the property without specifying their respective interests therein. At the same time and as a part of the same transaction all the parties executed another instrument in which Hickies is styled "party of the first
43 part" and the plaintiffs "party of the second part," by which it is agreed that said mining property was conveyed by plaintiffs to said Hickies in trust for him to organize a joint-stock company to work, operate, and dewelod said mines; that said company should be called the "Ithica Consolidated Gold and Silver Mill and Mining Company," and when organized Hickies would issue and deliver to the plaintiffs and place to their credit on the stock books of the company as unassessable stock an amount of stock not to exceed three-fifths of the capital stock of the company, and that the fulfilment of these promises by Hickies in this respect was the real consideration for which said deeds were made; that 20,000 shares for each mine, or 120,000 in the aggregate, should be set aside as a working capital to defray expenses, &c., and the stock to which plaintiffs were entitled should not exceed three-fifths of the capital stock which remained after setting aside or deducting this working capital of 120,000 shares. In July, 1881, Hickies organized said company under the laws of California, and in pursuance of the laws of Arizona filed the articles of incorporation with the recorder of Maricopa county. The capital stock was fixed at six millions of dollars, divided into six hundred thousand shares of the par value of ten dollars each. Of this stock Hickies at the same time subscribed for and took in his own name 584,600 shares. Upon the organization of the company Hickies was elected president thereof, and has held the office ever since and is now holding

it. In September, 1882, Hickies conveyed all this mining property to the said company, he at that time being president of the company, and the company, through him, at once took possession of the property, working and improving the same, and is now in
44 the actual possession thereof, claiming as owner under said deeds. Hickies in the meantime has sold some 25,000 shares of stock. The balance is still in his possession. The plaintiffs have received no stock of said company, and, their rights thereto being denied by defendants, in 1886 they brought this action to compel a specific performance of said agreement and a complete execution of the trust, and a decree was entered in their favor at the April term of said court, 1887, from which this appeal is now prosecuted.

It is urged that as these mines were unpatented the plaintiff- must show that *he* had complied with the mining laws—that is, that they had made a valid location and had done the assessment work—before they can seek any remedy in this case to enforce the contract of Hickies. We cannot concur with the proposition as between these contracting parties, grantors and grantees, trustee and *cestui qui trust.* and those holding under them with knowledge, the title of grantor cannot be disputed.

Alexander *vs.* Sherman, 16 P. R., 45; Blake *vs.* Thorne, 16 P. R. 270.

It is urged that the cause is barred by the statute of limitations. It is clear that the contract in evidence made Hickies a trustee of the title to these mines for the purpose of organizing a corporation and distributing the stock of such company among the owners after disposing of a part for working capital. This does not mean that Hickies was to keep all the stock of the company until that stock for working capital had been actually sold. It me-nt that when the company was organized and this stock was set apart or was devoted to this purpose, then grantors were to be entitled
45 to their stock. The statute of limitations does not begin to run in such a case. Hickies holds this stock in trust for the plaintiffs. We think the evidince sustains the findings and we see no error in this record.

The judgment is affirmed.

We concur.

JAMES H. WRIGHT, *C. J.*
WM. W. PORTER, *A. J.*
WM. H. BARNES, *A. J.*

Indorsed: No. 225. Charles Philes *et al. vs.* Wm. Hickies *et al.* Opinion. Filed June 20th, 1888. William Wilkerson, clerk, by J. H. Martin, deputy.

46 *Judgment.*

In the Supreme Court of the Territory of Arizona, Adjourned March Term, 1888.

CHARLES PHILES *et als.*, Pl't'ffs & Resp'ts,
vs.
WILLIAM W. HICKIES *et al.*, Def'ts & Appel'ts.

Appealed from Maricopa county.

This cause having been argued and submitted and justices of the supreme court having had the same under advisement and consideration and being fully advised, it is by all the justices of said court, to wit, Chief Justice James H. Wright and Associate Justices Wm. W. Porter and Wm. H. Barnes, ordered and adjudged that the judgment of the court below appealed from be, and the same is, affirmed.

Judgment entered June 23rd, 1888.

Attest: WILLIAM WILKERSON, *Clerk.*

Opinion by Hon. Wm. H. Barnes, A. J., Hon. James H. Wright, C. J., and Hon. Wm. W. Porter, A. J., concur-ing.

47 *Application for an Appeal.*

In the Supreme Court of the Territory of Arizona.

CHARLES E. PHILES, THOMAS H. BLAIR, and HENRY D. POLHEMUS, Plaintiffs and Respondents,
vs.
WILLIAM W. HICKIES and THE ITHICA CONSOLIDATED GOLD AND SILVER MILL AND MINING COMPANY, a Corporation, Defendants & Appellants.

The above-named defendants and appellants, conceiving themselves ag-rieved by the final judgment and decree entered on the 23d day of June, 1888, in the above-entitled action and court against them and in favor of plaintiffs and respondents, do each and all hereby appeal therefrom to the Supreme Court of the United States, and they pray that this their appeal may be allowed, and that a citation be duly signed and issued, and that a transcript of the record, proceedings, opinion, judgment, and evidence in the cause, duly authenticated, may be sent to the Supreme Court of the United States.

STREET & GOODRICH AND
A. D. LEMON,
Attorneys for the Def'ts & App'l'ts.

And now, to wit, on the seventeenth day of August, A. D. 1888, the above application having been duly presented and fully considered, it is ordered that the appeal be allowed as prayed for, and

that the same is hereby allowed; and if appellants desire a supersedeas that they give a bond in the penal sum of eight
48 thousand two hundred dollars; otherwise in the sum of one thousand dollars.

JAMES H. WRIGHT,
Chief Justice of the Supreme Court, Territory of Arizona.

Indorsed: Philes *et al. vs.* Hickies *et al.* Application for an appeal. Filed August 17th, 1888, at 4 o'clock p. m. William Wilkerson, clerk.

49 *Affidavit of N. A. Morford as to Value.*

In the Supreme Court of the Territory of Arizona.

CHARLES E. PHILES, THOMAS H. BLAIR, and HENRY D. POLHEMUS, Plaintiffs & Respondents,
vs.
WILLIAM W. HICKIES and THE ITHICA CONSOLIDATED GOLD & SILVER MILL & MINING COMPANY, a Corporation, Defendants & Appellants.

TERRITORY OF ARIZONA, *County of Maricopa*, } *ss*:

N. A. Morford, being duly sworn, says that he is a citizen of the United States over twenty-one years of age, and resides in Maricopa county, Territory of Arizona.

That the Ithica Consolidated Gold and Silver Mill and Mining Company is a corporation organized under the laws of the State of California.

That he (the affiant) is now and for the past five years has been the agent of the said corporation, and as such has had general charge of their business and the care and management of their property in Maricopa county, Arizona, and more especially of the
50 mines and property which are the subjects of the above-entitled action and which are in said county situate; he is well informed of the value of said mines and property, *begin* the matter in dispute in said cause, and that the value of the same is of the sum fifteen thousand dollars.

He also affirms that the capital stock of said corporation is divided into six hundred thousand shares, and that the value of each share is worth the sum of two and one-half cents, and that the value of the two hundred and eighty-eight thousand shares, being the matter in dispute, is of the value of seven thousand two hundred dollars.

And, further affirming, says that the matter in dispute in said action, exclusive of costs, does exceed and at all times has exceeded the sum of five thousand dollars.

Affiant further says that the value of matter in dispute, exclusive of costs, not appearing on the record in said cause, he makes this affidavit that the jurisdiction of the Supreme Court of the United States over said cause may appear of record.

N. A. MORFORD.

Subscribed and sworn to before me this 13th day of Aug., A. D. 1888.

LINCOLN FOWLER,
[SEAL.] *Notary Public.*

Indorsed: Philes *et al. vs.* Hickies *et ala.* Affidavit of N. A. Morford as to value. Filed Aug. 17th, 1888, at 4 p. m. William Wilkerson, clerk.

51 *Affidavit as to Value.*

In the Supreme Court of the Territory of Arizona.

CHARLES E. PHILES *et al.*, Plaintiffs,
vs.
W. W. WICKIES *et al.*, Defendants.

In the matter of fixing the bond for the purpose of *of* appealing the above cause from the judgment of said supreme court to the Supreme Court of the United States.

Charles Fleming, after being duly sworn, says that the value of the property involved in said action is thirty-five thousand dollars.

CHARLES FLEMING.

Subscribed and sworn to before me, a notary public, and I certify that Charles Fleming is personally known to me as a creditable person.

Witness my hand and official seal this the 21st day of August, 1888.

I. H. COX,
Notary Public.

Indorsed: Philes *et al. vs.* Hickies *et al.* Supreme court of the Territory of Arizona. Affidavit as to value. Filed Aug. 24th, 1888, at 4 p. m. William Wilkerson, clerk.

52 *Affidavit as to Value.*

In the Supreme Court of the Territory of Arizona.

CHARLES E. PHILES *et al.*, Plaintiffs,
vs.
W. W. HICKIES *et al.*, Defendants.

In the matter of fixing the bonds for the purpose of appealing the above cause from the judgment of said supreme court to the Supreme Court of the United States, Charles E. Philes, after being duly sworn, says that the value of the property involved in said action in thirty-five thousand dollars.

C. E. PHILES.

Subscribed and sworn to before me, a notary public, and I certify that Charles E. Philes is personally known to me as a credit-ble person.

Witness my hand and official seal this the 21st day of August, 1888.

[SEAL.] I. H. COX,
Notary Public.

Indorsed: Philes *et al. vs.* Hickies *et al.* Supreme court, Territory of Arizona. Affidavit as to value. No. 225. Filed Aug. 24th, 1888, at 4 p. m. William Wilkerson, clerk.

53 *Affidavit as to Value.*

In the Supreme Court of the Territory of Arizona.

CHARLES E. PHILES *et al.*, Plaintiffs,
vs.
W. W. HICKIES *et al.*, Defendants.

In the matter of fixing the bond for the purpose of appealing the above cause from the judgment of said supreme court to the Supreme Court of the United States, John Chaney, after being duly sworn, says that the value of the property involved in said action is fifty thousand dollars.

JOHN CHANEY.

Sworn to before me, and I certify that —— —— is personally known to me as a credi-ble person.

Witness my hand and seal August 21st, 1888.

J. H. COX,
Notary Public.

[SEAL.]

M. C. A. T.

Indorsed: Philes *et al. vs.* Hickies *et al.* No. 225. Supreme court, Territory of Arizona. Affidavit as to value. Filed August 24th at 4 p. m. William Wilkerson, clerk.

54 *Affidavit of Value by Hickies.*

In the Supreme Court of the Territory of Arizona.

CHARLES E. PHILES, THOS. H. BLAIR, and HENRY D. POLHEMUS, Plaintiffs & Respondents,
vs.
WILLIAM H. HICKIES and THE ITHICA CONSOLIDATED GOLD & SILVER MILL AND MINING COMPANY, a Corporation, Defendants & Appellants.

TERRITORY OF ARIZONA, *County of Maricopa*, } *ss.*

William H. Hickies, being duly sworn, says he is one of the defendants herein and the president of the Ithica Consolidated Gold & Silver Mill and Mining Company, another of defendants; that the

value of the matter in dispute, exclusive of costs, shall exceed the sum of and does exceed the sum of five thousand dollars.

That the reasonable value of the mines which may be included in the alternative judgment is fifteen thousand dollars and the value of the stock, which is the principal subject of litigation, is two and a half cents per share or for the 288,000 shares seven thousand two hundred dollars.

WILLIAM H. HICKIES.

Subscribed and sworn to before me this 3rd day of September, A. D. 1888.

P. S. PARLEY,
[SEAL.] *Notary Public.*

55 Indorsed: Philes *et al. vs.* Hickies *et al.* Affidavit of value by Hickies. Filed September 6th, 1888, at 11 o'clock a. m. William Wilkerson, clerk.

56 Supreme Court of the United States.

CHARLES E. PHILES, THOMAS H. BLAIR, and HENRY D. POLHEMUS, Plaintiffs & Respondents,
vs.
WILLIAM W. HICKIES and THE ITHACA CONSOLIDATED GOLD AND SILVER MILL AND MINING COMPANY, a Corporation, Defendants and Appellants.
} Cost Bond on Appeal.

Know all men by these presents that we, William W. Hickies, The Ithaca Consolidated Gold and Silver Mill and Mining Company, a corporation of the State of California, as principal, and H. Ohnick and N. A. Morford, as sureties, residents of Maricopa county, Territory of Arizona, *as sureties*, are held and firmly bound unto Charles E. Philes, Thomas H. Blair, and Henry D. Polhemus, of the Territory of Arizona, in the sum of one thousand dollars to be paid to the said Charles E. Philes, Thomas H. Blair, and Henry D. Polhemus, their heirs, executors, or administrators; to the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this thirty-first day of August, A. D. 1888.

Whereas the above-named William W. Hickies and the
57 Ithaca Consolidated Gold and Silver Mill and Mining Company have prosecuted and taken an appeal to the Supreme Court of the United States, the same having been allowed, from a final judgment and decree rendered against them and in favor of said Charles E. Philes, Thomas H. Blair, Henry D. Polhemus in the supreme court of the Territory of Arizona to reverse the said judgment and decree rendered in said court:

Now, therefore, the conditions of this obligation is such that if the above-named William W. Hickies and the Ithaca Consolidated Gold and Silver Mill and Mining Company, a corporation, shall prosecute

their appeal to effect, and if they fail to make their plea good shall answer all costs, then this obligation shall be void; otherwise to remain in full force and virtue.

WILLIAM W. HICKIES. [SEAL.]
THE ITHACA CONSOLIDATED GOLD AND SILVER MILL AND MINING COMPANY, [SEAL.]
By its president, WILLIAM W. HICKIES. [SEAL.]
H. OHNICK. [SEAL.]
N. A. MORFORD. [SEAL.]

58 UNITED STATES OF AMERICA, } ss:
Territory of Arizona, County of Maricopa, }

H. Ohnick and N. A. Morford, being duly sworn, depose and say, each for himself, that he is a resident freeholder of the county of Maricopa, Arizona, and is worth the sum of one thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

N. A. MORFORD.
H. OHNICK.

Subscribed and sworn to before me this 31st day of August, 1888.
[SEAL.] WEBSTER STREET,
Notary Public.

Indorsed: Philes *et al. vs.* Hickies *et al.* Cost bond on appeal. The within bond is hereby approved this the 6th day of August, 1888. James H. Wright, chief justice. Filed September 6th, 1888, at 11 o'clock a. m. William Wilkerson, clerk.

59 *Assignment of Errors and Prayer for Reversal.*

In the Supreme Court of the United States.

Assignment of errors by defendants, W. W. Hickies and the Ithica Consolidated Gold and Silver Mill and Mining Company, being appellant in the Supreme Court of the United States.

The supreme court of the Territory of Arizona erred in affirming the judgment of the district court of the second judicial district of Arizona in and for Maricopa county, in that—

II.

The findings of facts and judgment of the court are unsupported by the evidence and are contrary to the evidence.

III.

There is no testimony to support the second, third, fifth, sixth, seventh, and eighth findings of fact, and without them the judgment cannot be supported.

IV.

That it is nowhere shown that plaintiffs or the appellees were collectively entitled to 288,000 shares of stock from the Ithica Company or from W. W. Hickies, the defendants and appellants, or that said Philes was so entitled to 232,000 shares, or that said Blair was entitled to 40,000 shares, or that said Polhemus was entitled to 16,000 shares each.

V.

It is nowhere shown that any of defendants, appellants
60 herein, were in a situation where it were possible for them to have set apart or to have delivered any stock to any of plaintiffs, appellees herein, even if they were obligated to do so.

VI.

It is nowhere shown but that all the stock sought to be obtained had already been placed to the credit of each of the plaintiffs, appellees, on the books of the company, and that Blair and Polhemus had actually received certificates for their respective shares.

VII.

That no case was made out against any of defendants, appellants, in favor of plaintiffs, appellees, and especially in favor of Blair and Polhemus.

VIII.

That if Philes should recover any amount it should have been but for 96,000 shares.

IX.

Each should have recovered equally if at all, so that if the shares of one were purchased by the defendants, appellants, before judgment, such sale would not have been affected by a judgment in favor of those whose interests were not purchased.

Wherefore W. W. Hickies and the Ithica Consolidated Gold and Silver Mill and Mining Company, the appellants in the Supreme Court of the United States, pray that the judgment of the supreme court of the Territory of Arizona may be reversed, set aside, or modified, as this honorable court may deem lawful, just, and right.

61 Respectfully submitted,

STREET AND GOODRICH,
Attorneys for Appellants.

Indorsed: Supreme Court of the United States. Charles Philes *et al. vs.* William W. Hickies *et al.* Assignment of errors and prayer for reversal. Filed September the 26th, 1888, at 9 o'clock a. m. William Wilkerson, clerk supreme court Arizona.

62 TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

Webster Street, being duly sworn, says that he is one of the attorneys of record in the supreme court of Arizona in the case of Charles Philes *et al.* against W. W. Hickies *et al.*, for the defendants; that he served the annexed citation on Charles Philes, one of the plaintiffs in said suit, at Phœnix, Arizona, on the 30th day of August, 1888, by delivering to him a copy thereof, and also notifying him of the contents thereof.

That affiant also served the said citation on J. B. Ford, Esq., on the 7th day of September, 1888, at Phœnix, Arizona, who is one of the attorneys of record in said court for plaintiffs, Charles E. Philes, Thomas H. Blair, and Henry D. Polhemus, by delivering to him a copy thereof; whereupon said J. B. Ford, Esq., accepted service of the same in writing, as appears on said citation, and signed his name as J. B. Ford, att'y for appellees, to such acceptance.

WEBSTER STREET,
Att'y for Def'ts & Appellants.

Subscribed and sworn to before me this 21st day of September, A. D. 1888.

P. S. PERLEY,
Notary Public.

63 STATE OF OREGON, } ss:
County of Yam Hill, }

B. D. Springer, being first duly sworn, deposes and says that at all the times hereinafter mentioned he was over the age of twenty-one years and not a party to or interested in the within-entitled matter; that on the 13th day of September, 1888, at the county of Yam Hill, State of Oregon, he personally served the annexed citation on Thomas H. Blair, personally known to me to be the Thomas H. Blair therein mentioned, by then and there delivering to and leaving with said Thomas H. Blair personally a true copy of said citation.

B. D. SPRINGER.

Subscribed and sworn to before me this 13th day of September, 1888.

[SEAL.]

B. H. SPRINGER,
Notary Public for the State of Oregon.

Costs of serving the above:

Mileage, 2½ mile	25
Service	50
Notarial work	25
	$1 00

64 STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

Herman Dickle, being first duly sworn, deposes and says that at all the times herein mentioned he was over the age of twenty-one years and not a party to or interested in the within-mentioned action and matters; that on the 12th day of September, 1888, at the county of Los Angeles, State of California, he personally served the annexed paper-writing citation on the within-named Henry D. Polhemus, personally known to me to be the said Henry D. Polhemus, by then and there delivering to and leaving with said Henry D. Polhemus a true copy of said citation.

HERMAN DICKEL.

Subscribed and sworn to before me this 12th day of September, 1888.

[SEAL.]

P. JAMES,
Notary Public.

65 UNITED STATES OF AMERICA, ss:

To Charles E. Philes, Thomas H. Blair, Henry D. Polhemus, Greetings:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, D. C., on the second Monday in October next 1888), pursuant to an appeal allowed by the Hon. James H. Wright, chief justice of the supreme court of Arizona, on the seventeenth day of August, A. D. 1888, from a judgment rendered in the supreme court of the Territory of Arizona on the 23rd day of June, A. D. 1888, in an action on appeal to that court, wherein you were the plaintiffs and respondents and William W. Hickies and Ithica Consolidated Gold and Silver Mill and Mining Company, a corporation, were the defendants and appellants, to show cause why that said judgment in your favor should not be set aside, reversed, corrected, and speedy justice should not be done to the parties in whose behalf said appeal is allowed.

Witness the Honorable Samuel F. Miller, senior and presiding associate justice of the Supreme Court of the United States, this 17th day of August, 1888.

JAMES H. WRIGHT,
Chief Justice of the Supreme Court of the Territory of Arizona.

We hereby admit and accept service of the within citation by copy delivered to us this 7th day Sept., A. D. 1888, at Phœnix, Arizona.

J. B. FORD,
Att'y for Appel-ees.

66 Indorsed: Philes *et al. vs.* Hickies *et al.* Citation on appeal. Filed September 26th, 1888, at 9 o'clock a. m. William Wilkerson, clerk.

67 Supreme Court.

TERRITORY OF ARIZONA, *ss*:

I, William Wilkerson, clerk of the supreme court of the Territory of Arizona and custodian of the records thereof, do hereby certify:

1st. That the above and foregoing contains a full, true, correct — of the transcript on appeal from the 2 judicial district court to said supreme court in an action lately pending in said district court wherein Charles Philes *et al.* were plaintiffs and William W. Hickies *et al.* were defendants.

2nd. A full and complete transcript of the record and proceedings of the supreme court in the cause lately pending in said supreme court wherein the said Charles E. Philes *et al.* were respondents *vs.* said William W. Hickies *et al.*, appellants, and of the whole of said record and proceedings as the same appears on file and of record in my office.

Seal United States Supreme Court, Arizona.

In witness whereof I have hereunto set my official hand and affixed the seal of said supreme court on this 29 day of Sept., A. D. 1888.

WILLIAM WILKERSON, *Clerk*.

Endorsed on cover: Case No. 13358. Arizona T. sup. court. No. 261. William W. Hickies and The Ithaca Consolidated Gold and Silver Mill and Mining Company, appellants, *vs.* Charles E. Philes, Thomas H. Blair, and Henry D. Polhemus. Filed October 17, 1888.

the evidence in the case, and no error can be assigned in respect to any finding of fact.

Prentice vs. Stearns, 113 U. S., 435.

The Record, pp. 10 *et seq.*, shows a transcript of short-hand notes of testimony, followed by exhibits and motion for new trial. On p. 26 it appears over the signature of the trial Judge, that the "foregoing statement is agreed to, etc.," as copies of the pleading, evidence and exhibits used in the trial, etc.

This is by no means a bill of exceptions. It nowhere appears that all the evidence is included. It is impossible, therefore, to consider the errors assigned, as all go to the evidence upon which the findings are based. It is not assigned for error that the findings do not sustain the judgment.

Respectfully submitted,

W. H. BARNES,

Attorney for Appellees.

[illegible]